

“Mediators and Lawyers Behaving Badly: Ethics in Mediation”

EEOC EXCEL Conference 2013 – Presenter: Anne Bachle Fifer

Model Standards of Conduct for Mediators – Categories:

1. *Self-determination (neutrality)*
2. *Impartiality*
3. *Conflict of Interest*
4. *Competence*
5. *Confidentiality*
6. *Quality of the Process*
7. *Advertising and Solicitation*
8. *Fees*
9. *Advancement of Mediation Practice*

These Standards were approved jointly by the ABA, ACR and AAA, and can be accessed at:

[http://www.acrnet.org/uploadedFiles/Practitioner/ModelStandardsofConductforMediatorsfinal05\(1\)\(1\).pdf](http://www.acrnet.org/uploadedFiles/Practitioner/ModelStandardsofConductforMediatorsfinal05(1)(1).pdf)

1. Hartman

The mediation has ended with a partial agreement, so the mediator asks the parties and their attorneys when they'd like to re-convene. Plaintiff's attorney suggests a date two weeks out; the mediator agrees. Defense attorney then says to the mediator, "That won't work for you or me because that's when you'll be at my place in Florida." The mediator says, "Oh, that's right—I'm really looking forward to that! So it'll have to be four weeks out."

- a. There's no problem because the vacation won't occur until after the mediation has just about ended.
- b. There's no problem as long as they're not having an affair.
- c. The mediator should have disclosed the vacation plans at the start of the mediation.
- d. The mediator should have declined the mediation.

Hartman v. Hartman, Michigan Court of Appeals #304026, released August 7, 2012, unpublished

Standards of Conduct category: _____

2. Video, *In re OR v JR*

(Parties reach verbal agreement in mediation, but one party phones mediator later to ask mediator to change a key term in his favor, and mediator agrees to write it up that way.)

- a. The mediator did the right thing – father knows best.
- b. The mediator did the right thing; the attorneys should have caught this.
- c. The mediator should have contacted mother before agreeing to this.
- d. The mediator should have re-convened the mediation.

In re O.R. v. J.R., No. E034376, 2004 WL 585583 (Cal. App. Mar. 25, 2004)

Standards of Conduct category: _____

3. Video, *Guthrie v Guthrie*

(One party is visibly ill while agreement is being drafted.)

- a. The mediator did the right thing; 4 valium isn't that many.
- b. The mediator did the right thing; she checked and they said they were okay.
- c. The mediator should have caucused with the plaintiffs to determine whether to proceed with the mediation.
- d. The mediator should have terminated the mediation.

Guthrie v. Guthrie, 594 S.E.2d 356 (Ga. 2004)

Standards of Conduct category: _____

4. Sandy Hook

The mediator mediates the divorce of a middle-aged couple who have teenagers. Three years later, one of the teens kills his mother, several others, and himself. The media contact the mediator and ask her questions about the couple, their family issues, etc. How should the mediator respond?

- a. She can confirm that she was the mediator, but can say no more.
- b. She can share her recollections of the mediation, but cannot repeat statements made in the mediation.
- c. She can repeat only the party statements that reflect the parties in a positive light.
- d. Since one of the parties to the mediation is now dead, she is free to discuss what occurred in the mediation.

"Mediator: Mom didn't like to leave gunman alone" by Matt Apuzzo and Adam Geller, Dec. 17 2012

Standards of Conduct category: _____

5. Video, *In re Non-Member of State Bar of Arizona*

(Plaintiff's attorney admits during mediation that he is not licensed to practice law in that state.)

Did the mediator do anything wrong?

- a. The mediator handled this appropriately—he called a break and sought outside advice.
- b. The mediator should have discovered this problem prior to the mediation.
- c. The mediator should have terminated the mediation.
- d. This isn't a problem, since it happened in Arizona.

Standards of Conduct category: _____

Did the attorney "Carl" do anything wrong?

- a. The attorney, "Carl," handled this appropriately — he had told his clients that he wasn't licensed, then he disclosed to opposing counsel.
- b. This was not unauthorized practice of law because it was not court-ordered, and mediators do not need to be lawyers.
- c. The attorney should not have agreed to represent these people in mediation, because it's unauthorized practice of law.
- d. This isn't a problem, since it happened in Arizona.

Model Rules of Professional Conduct principles implicated: _____

In re Non-Member of State Bar of Arizona, 152 P.3d 1183 (Ariz. 2007)

6. Video, *Statewide Grievance Committee v Kennelly*

(Defense attorney states in joint session that there's only \$320,000 available for settlement, then hints to mediator in caucus that she has more money.)

Did the mediator do anything wrong?

- a. The mediator handled this well.
- b. The mediator did the best she could, given that she's a judge.
- c. The mediator should have asked Defendant just how much more money he had.
- d. The mediator should not have suggested her own figure of \$400,000 to either side.

Standards of Conduct category: _____

Did the defense attorney do anything wrong?

- a. The attorney did nothing wrong – this was just bluffing, which is acceptable attorney behavior in mediation.

- b. The attorney did nothing wrong—he put the amount of money on the table that the mediator asked for, \$400,000.
- c. The attorney misrepresented a material fact, but it's no big deal.
- d. The attorney misrepresented a material fact, which is a violation of the Rules of Professional Conduct.

Model Rules of Professional Conduct principles implicated: _____

Statewide Grievance Committee v. Kennelly, No. CV040833515S, 2005 WL 758055 (Conn. Super., Feb. 25, 2005)

7. Phoenix 2013

In a civil dispute between two businessmen, the mediator does no screening before or during the mediation to determine whether either party has a propensity for violence or has a weapon. The mediation ends without an agreement; plaintiff departs first, goes to his car, retrieves a gun, and returns to the lobby, where he shoots and kills the defendant and his attorney. (Plaintiff was pro se.)

- a. The mediator did nothing wrong. It would not be reasonable to screen in a case such as this.
- b. Mediations should be held only in facilities with metal detectors.
- c. The mediator should have met with each party separately, prior to the start of the mediation, to screen for impediments such as violent tendencies.
- d. The mediator should have administered the “mediator screening protocol” for d.v. prior to mediating this case.

Standards of Conduct category: _____

8. Vittiglio

In caucus, the plaintiff's attorney repeatedly assures his client that defendant's offer is better than what the plaintiff could obtain at trial. The mediator—a lawyer with subject matter expertise -- agrees with plaintiff's attorney. May the mediator say so?

- a. No. To express an opinion would undermine the mediator's neutrality and party self-determination.
- b. No. To express an opinion would be taking on a role other than that of mediator.
- c. Yes. The parties probably hired the mediator for this expertise, so it would be unethical for the mediator *not* to express an opinion.
- d. Yes. This is a normal and expected role of an attorney-mediator.

Standards of Conduct category: _____

Vittiglio v. Vittiglio, 297 Mich App 391; 824 NW2d 591 (2012)